



INTERIOR BOARD OF INDIAN APPEALS

Rio Arriba, New Mexico, Board of County Commissioners
v. Acting Southwest Regional Director, Bureau of Indian Affairs

38 IBIA 108 (09/12/2002)

Related Board cases:

36 IBIA 14, Reconsideration denied, 36 IBIA 102

38 IBIA 18



United States Department of the Interior

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INTERIOR BOARD OF INDIAN APPEALS
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RIO ARRIBA, NEW MEXICO, BOARD
OF COUNTY COMMISSIONERS,
Appellant

v.

ACTING SOUTHWEST REGIONAL
DIRECTOR, BUREAU OF INDIAN
AFFAIRS,
Appellee

: Order Denying Reconsideration
:
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:
: Docket No. IBIA 02-25-A
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:
: September 12, 2002

On July 24, 2002, the Board vacated the October 23, 2001, decision of the Acting Southwest Regional Director, Bureau of Indian Affairs, to take approximately 32,000 acres in Rio Arriba County into trust for the Jicarilla Apache Nation. Rio Arriba, New Mexico, Board of County Comm'rs v. Acting Southwest Regional Director, 38 IBIA 18 (2002). In the same decision, the Board referred this matter to the Assistant Secretary - Indian Affairs under 43 C.F.R. § 4.337(b) for exercise of his discretionary authority and issuance of a new decision. The Board made the referral "in order to remove any question as to whether BIA's final decision in [the] matter has been influenced by bias." 38 IBIA at 29.

The Acting Regional Director and the Nation (Petitioners) have filed a petition for reconsideration. Their principal arguments are: (1) The Assistant Secretary has already decided that the Regional Director did not commit any wrongdoing, and his decision is binding on the Board; and (2) the Regional Director did not participate in the decision-making process leading to the October 23, 2001, decision. In support of these arguments, Petitioners submit a July 25, 2001, letter signed by the Assistant Secretary and addressed to counsel for the Nation; an August 23, 2002, declaration signed by the Regional Director; and an August 23, 2002, declaration signed by the Acting Regional Director.

The Board ordinarily declines to consider arguments or evidence presented for the first time in a petition for reconsideration. E.g., Yeahquo v. Southern Plains Regional Director, 36 IBIA 59 (2001); James v. Acting Rocky Mountain Regional Director, 35 IBIA 151 (2000), and cases cited therein. Petitioners acknowledge that they are aware of the Board's practice in this regard. They contend, however, that their new arguments and evidence could not have been presented earlier. Their theory appears to be that they could not have anticipated that

the Board would take Appellant's bias argument seriously. They also argue that presenting their new arguments and evidence earlier would have required the Nation to make inconsistent arguments. The Nation states that it "knows of no rule of practice or procedure which requires asserting mutually exclusive alternative arguments." Petition for Reconsideration at 10.

The Assistant Secretary's July 25, 2001, letter was written in response to a letter from the Nation's attorney concerning Appellant's March 5, 2001, allegation of improper conduct on the part of the Regional Director. The Assistant Secretary's letter is similar to the August 17, 2001, letter signed by the Deputy Commissioner of Indian Affairs and addressed to counsel for Appellant. ^{1/} However, whereas the Deputy Commissioner's letter did not directly address Appellant's charge of improper conduct, the Assistant Secretary's letter states: "The record does not reflect any wrongdoing on the part of the Southwest Regional Director that warrants removal of delegated authority to render a decision in this matter." It is this statement upon which Petitioners rely for their contention that the Assistant Secretary has issued a final Departmental decision on Appellant's bias argument. ^{2/}

It appears that the Assistant Secretary did not send copies of his July 25, 2001, letter to Appellant or the Regional Director. The letter itself does not show that copies were sent. Appellant states that it did not receive a copy, and Petitioners state that no copy was provided to the Regional Office until after the Board issued its July 24, 2002, decision. ^{3/}

If the Assistant Secretary intended his letter to be a decision, he was required by 25 C.F.R. § 2.7(a) to "give all interested parties known to [him] written notice of the decision." As he apparently did not give the notice required for a decision, the Board considers it unlikely that he intended his letter to be a decision. However, there is no need for the Board to determine the Assistant Secretary's intent. As this matter is being referred to him, the Assistant Secretary will have the opportunity to clarify his intent. If he did intend his letter to be a final Departmental decision on Appellant's bias argument, he may simply so state.

In support of their contention that the Regional Director did not participate in the October 23, 2001, decision, Petitioners offer declarations signed by the Regional Director and the Acting Regional Director. Neither declaration was even in existence when the Board issued its July 24, 2002, decision. In accordance with its usual practice, the Board declines to consider

^{1/} Appellant's Mar. 5, 2001, letter and the Deputy Commissioner's Aug. 17, 2001, response are discussed at 38 IBIA 26-27.

^{2/} Under 25 C.F.R. § 2.6(c), a decision made by the Assistant Secretary is final for the Department unless the decision states otherwise.

^{3/} Petitioners state that this is why the Assistant Secretary's letter was not included in the administrative record submitted to the Board.

these documents. Even if it were to consider them, however, the Board would find them ineffective to remove the cloud that now hangs over this case. 4/

The Board finds no merit in Petitioners' contention that their new arguments and evidence could not have been presented earlier. Appellant devoted a considerable portion of its opening brief to its bias argument. The Regional Director and the Nation had ample opportunity to respond to Appellant's arguments in their answer briefs. However meritless they believed Appellant's bias argument to be, they were required to present all of their responsive arguments and evidence at that time.

43 C.F.R. § 4.315(a) provides that "[r]econsideration of a decision of the Board will be granted only in extraordinary circumstances." The Regional Director and the Nation have failed to show extraordinary circumstances warranting reconsideration in this case.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this petition for reconsideration is denied.

//original signed

Anita Vogt
Administrative Judge

//original signed

Kathryn A. Lynn
Chief Administrative Judge

4/ In some of their arguments, Petitioners appear to question the Board's motivation in referring this matter to the Assistant Secretary. The Board did not make the referral to reward Appellant, as Petitioners suggest, but rather to enable the Assistant Secretary to cure an appearance of impropriety which, if not cured, threatens to mar the integrity of the trust acquisition process in this case.